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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 404

OFFUTT HOUSING COMPANY, a Corporation,
Petitioner,

vs.

COUNTY OF SARPY and ROBERT M. EBY, TREASURER OF COUNTY OF SARPY, NEBRASKA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA.

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COUNTY OF SARPY and ROBERT M. EBY, TREASURER OF COUNTY OF SARPY, NEBRASKA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA.

Petitioner, Offutt Housing Company, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Nebraska entered in the above-entitled case.

REFERENCE TO OPINIONS BELOW.

The opinion of the Supreme Court of Nebraska is reported in 160 Neb. 320, 70 N. W. 2d 382, and is printed in the Appendix, *infra*, at pp. 29-53. The opinion (oral), findings and judgment of the District Court of Sarpy County, Nebraska (Tr. 42-49), which are unreported, are printed in the Appendix, *infra*, at pp. 5-28.

JURISDICTION.

The judgment of the Nebraska Supreme Court (Tr. 447, App., *infra*, p. 53) was entered on May 6, 1955. A timely petition for rehearing was filed on May 26, 1955 (Tr. 473) and denied on June 24, 1955 (Tr. 474). The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3), since a right and immunity is especially set up and claimed under the Constitution and statutes of the United States.

QUESTION PRESENTED.

The United States leased to petitioner for 75 years land on an Air Base subject to the exclusive jurisdiction of the United States, for the construction and operation of housing for Air Force personnel. The United States retained title to the buildings. The question presented is whether Nebraska may collect from petitioner a property tax on the buildings and on household appliances and office equipment owned by petitioner. This involves the question whether Congress has waived the immunity of such property from state taxation in the Wherry Military Housing Act of August 8, 1949, 63 Stat. 570, 12 U. S. C. § 1748, or § 6 of the Military Leasing Act of August 5, 1947, 61 Stat. 775, 5 U. S. C. § 626s-6.

STATUTES INVOLVED.

The pertinent provisions of the statutes cited immediately above are quoted in the Appendix, *infra*, at pp. 68-73. The statutory framework which gives rise to this case may be outlined as follows:

In 1949 the military establishment was faced with a problem of loss of skilled personnel because of lack of sufficient housing facilities and the "deplorable" housing

conditions at military installations (S. Rept. No. 410, p. 2, H. Rept. No. 854, p. 4, 81st Cong., 1st Sess.[1]). Although in the past, when the Armed Services were small, the Government itself had provided living quarters for service men (H. Rept. No. 854, p. 4), to have provided the estimated 261,555 family units needed in 1949 would have cost the Government from two to three billion dollars (S. Rept. No. 410, p. 3; H. Rept. No. 854, p. 4, *supra*). To meet this need at slight cost to the Government, through utilizing the services of private enterprise, the Wherry Act amended the National Housing Act (by adding Title VIII) so as to authorize the Federal Housing Administration (FHA) to insure mortgages on housing at or in the area of military installations, upon the certificate of the Secretary of Defense that such housing

> "is necessary to provide adequate housing for such personnel, that such installation is deemed to be a

1. "Representatives of the three branches of the National Military Establishment, appearing before your committee, strongly urged the enactment of this measure. They stressed, in terms of the efficiency of the armed services, the urgent need for adequate housing facilities to serve families of their personnel. They made it abundantly clear that, to attract and hold the highly trained, experienced, and technical personnel now required by the Departments of the Army, the Navy, and the Air Force, it is essential that this personnel be afforded an opportunity to live comfortable and normal lives, insofar as military duty permits, on a reasonable parity in terms of housing, with the average American citizen. The fact that most of them do not now have this privilege is a major contributing factor to the existence of a morale problem that bears on the effectiveness of our armed forces, to the difficulties in recruiting able men, and to the large percentage of trained men who are failing to reenlist at the expiration of their enlistment terms.

"Adequately training men to maintain and operate our present-day intricate war machines is an extensive and costly undertaking. Whenever a trained man fails to reenlist, the investment of the Government in his training is lost to the armed services involved and another man must be given similar training. The Air Force in September 1948 made an analysis of its enlisted personnel which indicated that only 59 percent of all married enlisted personnel intended to reenlist. However, 79 percent indicated that

permanent part of the Military Establishment, and that there is no present intention to substantially curtail activities at such installation." (§ 803, 63 Stat. 570, 12 U. S. C. § 1748b (b) (2)).

(This certificate took the place of the requirement under other titles of the National Housing Act that the Federal Housing Commissioner find that a loan is an acceptable commercial risk.) Insurance of mortgages up to $500,000,000 was authorized, but the President was authorized to increase the amount to $1,000,000,000 (§ 803(a), 12 U. S. C. § 1748b (a)).

The Act also authorized the Secretaries of the military services to lease real property for housing purposes without the restrictions otherwise applicable to the leasing of Government property (§ 805, 63 Stat. 570, 12 U. S. C. § 1748d). The House Report (No. 854, 81st Cong., 1st Sess., p. 5) stated that:

"* * * difficulties in obtaining suitable sites is fre-

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they would reenlist if the Government were to provide family housing. Those failing to reenlist include some of the best trained and most able men." H. R. No. 854, 81st Cong., 1st Sess., p. 4.

The problem still exists in 1955. The Senate Report (No. 404, 84th Cong., 1st Sess., p. 19) on the Housing Act Amendments of 1955 states:

"The Department of Defense testified that there is a net deficit of housing for servicemen and their families at military and naval bases of approximately 234,000 units. The committee was impressed by testimony as to the necessity for eliminating this deficit. One of the paramount considerations is the fact that adequate housing undoubtedly plays an important role in the decision of servicemen to remain in the services. The failure of highly trained specialists to reenlist results in immediate and substantial monetary loss to the Government. For example, in the Strategic Air Command alone, during the past 4 years, the services of 114,848 airmen have been lost through failure to reenlist. According to testimony before the committee, the loss of these men and their replacement by others results in a cost to the United States of $1,694 million. Also significant is the fact that Air Force personnel particularly are required to live on the base or very near it, in order that they may be subject to immediate call."

quently a deterrent to the development of housing by private enterprise in the vicinity of military installations, particularly in isolated areas. The leasing of such sites by the Military Establishment at nominal considerations would further make possible the achievement of lower rentals for the personnel of the establishment."

The Senate Report (No. 410, 81st Cong., 1st Sess., p. 8) noted that the best sites may be on land subject to military jurisdiction, and that such leasing for a nominal consideration would assist and "make possible rentals within the financial reach of a larger number of prospective tenants."

Section 805 of the Act authorized the leasing of property "under the authority of" the Act of August 5, 1947 (61 Stat. 774, 5 U. S. C. § 626s-6), without regard to limitations imposed by said Act with respect to the term or duration of the lease. The Act of 1947 had been enacted to permit the Secretaries of the Armed Services to lease for long terms plants and facilities built by the Government at great expense during the war, which the Government wished to keep in stand-by status but which could be usefully operated by private industry when not needed for military purposes. H. Rept. No. 623, 80th Cong., 1st Sess. p. 3. Section 6 of the 1947 Act (5 U. S. C. § 626s-6) provides:

"The lessee's interest, made or created pursuant to the provisions of this Act, shall be made subject to State or local taxation. Any lease of property authorized under the provisions of this Act shall contain a provision that if and to the extent that such property is made taxable by State and local governments by Act of Congress, in such event the terms of such lease shall be renegotiated."

The purpose of the first sentence of this provision was to remove any doubt as to whether the interest of the lessee,

as distinct from that of the Government as owner of the title, could be taxed in states which permitted taxes upon leasehold interests (see pp. 26-28, *infra*). The second sentence was intended to permit renegotiation of the lease, if Congress by subsequent legislation permitted local taxation of the property leased, which meant the property owned by the Government (H. Report 623, 80th Cong., 1st Sess., p. 3).

STATEMENT.

This is a suit by petitioner against the County of Sarpy and its Treasurer for a declaratory judgment that it is not required to pay the County certain taxes assessed against it and for ancillary injunctive relief (Tr. 3-11). The District Court adjudged that Nebraska had no authority to impose the taxes in question (Tr. 42-49), but the Supreme Court of Nebraska reversed (Tr. 447-472).

The facts are not in dispute. Offutt Air Force Base (formerly Fort Crook), the headquarters of the Strategic Air Command (Tr. 97), is owned by and subject to the exclusive jurisdiction of the United States.[2] The Commander of the Base determined that a housing project at reasonable rentals was needed in order to secure and retain skilled personnel (Tr. 97-98, 105, 110, 139-140), and the Department of the Air Force submitted to the FHA the certificate required by the Wherry Act (Ex. 3, Tr. 280, 68). The Air Force and the FHA thereupon proceeded with the project. On January 18, 1951 the Air Force leased 63 acres of land on the Air Base to petitioner, to be used for the erection of a 611-unit housing project, in accordance with project specifications approved by the Air Force and FHA (Ex. 4, Tr. 283-295, 68). The

2. Nebraska has ceded exclusive jurisdiction (Neb. R. R. S. 1943, §§ 72-601, 602, 604), and the United States has accepted it (Ex. 2, 2(a), Tr. 269, 272-278, 68).

lease was in the standard form used by the Air Force under the Wherry Act at that time (Tr. 153, 165). Only a nominal rental of $100 per year was to be paid to the Government (Ex. 4, p. 6, Tr. 289), in order to keep down the rentals to be charged the subtenants (Tr. 168).[3] Tenants were to be designated by the Commanding Officer from among personnel of the Air Force; only if Air Force personnel were not designated or available could the lessee rent to other persons (Ex. 4, p. 6, Tr. 289).

Paragraph 11 of the lease, which provides that title to the buildings shall be in the United States, reads as follows (Ex. 4, p. 9, Tr. 292):

> "That upon the expiration of this lease, or earlier termination, all improvements made upon the leased premises *shall remain the property of the Government* without compensation, provided that the provisions of this Condition shall not apply to facilities erected by utility companies on the leased premises for the purpose of furnishing utility services to the housing project. The buildings and improvements erected by the Lessee, constituting the aforesaid housing project, *shall be and become, as completed,* real estate and part of the leased land, and public buildings of the United States, leased to Lessee for the purpose of serving the governmental and public purpose of providing military housing in accordance with Title VIII of the National Housing Act, and in accordance with

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3. The nominal character of the rental paid the Government made meaningless Paragraph 8 of the lease (Ex. 4, p. 8, Tr. 291), which provided for renegotiation and reduction of the rental if Congress consented to the imposition of taxes "upon the property owned by the Government and included in this lease (as opposed to the leasehold interest of the Lessee therein)." Paragraph 8 also provided:

> "That the Lessee shall pay to the proper authority, when and as the same become due and payable, all taxes, assessments, and similar charges which, at any time during the term of this lease, may be taxed, assessed or imposed upon the Government or upon the Lessee with respect to or upon the leased premises."

the provisions of this lease, and subject to the term of this lease, and any renewal or extension of this lease." (Italics supplied.)

Maximum rentals were to be fixed by the FHA with the concurrence of the Air Force[4] (Tr. 205, 148-149, 162-163, 191, 198; Ex. 8, Art. V, VII, Tr. 309-310, 72; Ex. 12, pp. 8-9, Tr. 327-328; Ex. 14, p. 2, opp. Tr. 364, 193). Rentals varied with the rank of the tenant, so that lower-paid military personnel would pay less than officers (Tr. 145-146, 133-135; Ex. 14, Tr. 362, 193). These rentals are lower than those for comparable housing off the Base (Tr. 118). Rentals were established by the Air Force and the FHA on the assumption that no state or local taxes would be paid (Ex. 13, p. 2, Tr. 358-359, 188, 103, 129-131).[5] If such taxes are payable, the cost will be passed on in the form of increased rentals to the tenants of the project (Tr. 105, 201-2, 358).[6] This affects the likelihood that skilled personnel will remain in the Air Force (Tr. 140, 110).

The Air Force was to provide fire protection and policing (Ex. 4, Paragraph 9, Tr. 291). It furnishes sewage and water service (Tr. 225-227, 237) and access roads (Tr. 237); the lessee maintains the roads within the leased property (Tr. 231, 237). The Base is not in a school district or municipality (Tr. 142; Ex. 1, Tr. 265).

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4. After expiration of the mortgage insurance, rentals are subject to the control of the Air Force (Ex. 4, Pars. 4, 18, Tr. 290, 293).

5. The rentals originally fixed and in effect at the time of trial were based upon the Project Analysis of the FHA (Ex. 13, Tr. 357-360). This Analysis contains the statement (Tr. 358) that it is "Processed on the assumption that the projects will not be subject to State, County or School Property Tax. If such taxes are assessed, rents will have to be adjusted accordingly." A rental increase to cover property taxes has since been allowed, conditional on the outcome of this litigation.

6. See preceding note.

Petitioner is required to provide and maintain household appliances in the apartments (Tr. 238).

As contemplated by the lease, on April 1, 1951, petitioner executed a mortgage in the amount of almost $5,000,000 to the Manufacturers Trust Company of New York on its interest in the property (Ex. 15, Tr. 365-372, 221). The mortgage was insured by the FHA (Tr. 203-204).[7]

Petitioner was incorporated on a model charter form prescribed by FHA (Tr. 196-197, 158), whereby FHA received the preferred stock of petitioner (Tr. 203; Ex. 14, p. 2, Opp. Tr. 364, 193) which gave it voting control in certain circumstances, and the right to control the rentals charged (Ex. 8, Tr. 308-309, 310, 72; FHA Rules and Regulations, Sec. 5, par. 4, Tr. 327-328).

The apartments were then constructed, and were occupied entirely by military personnel and their dependents (Tr. 101). There was testimony that the buildings had a life expectancy of about 35 years (Tr. 233), although they could (although not profitably for petitioner) be repaired and maintained in condition beyond the term of the lease (Tr. 243).

Petitioner did not list with the County Assessor of Sarpy County any property located on Offutt Air Force Base (Tr. 257). On June 23, 1952, the Assessor himself executed a purported "Business and Professional Schedule of Personal Property," which he claimed to be owned by petitioner and subject to taxation (Tr. 257; Ex. 5, Tr. 298-299 (back), 69), copied in the Appendix, *infra*, pp. 3-4. The form is divided into parts for tangible and intangible property. Under part F, entitled "Furniture and Fixtures—

7. This, of course, meant that there was no possibility that a default would result in the foreclosure of the Government's interest in the buildings, since any default would be made good by the FHA, which would then itself succeed to the right of the mortgagee.

Tools and Equipment", the Assessor listed office furnishings, which he valued at $205, and household appliances, which he valued at $69,695. Under part I entitled "Improvements on Leased Land", the Assessor inserted the amount $755,785, which, the Assessor admitted, represented his "opinion as to the value of the buildings" (Tr. 258-259).[8] The total amount of $825,685 was entered opposite the classification of "Apartment Houses" in part J of the form, and also, under Item 135 as the "TOTAL TANGIBLE ASSESSMENT." Nothing was entered under parts K and L as intangible property (which, the form states, is subject "only to an intangible tax of 25¢ on every $100 valuation" for Class "A" intangible property and 80¢ per $100 on Class "B").[9] The Assessor executed a similar return for 1953, after completion of the project (Tr. 257-258, Ex. 6, Tr. 301-302 (back), 70), in which he valued the property at $2,778,580.

On the basis of the 1952 schedule the respondents levied taxes against petitioner in the amount of $10,783.45[10] (Tr. 112). Petitioner did not pay the taxes assessed (Tr. 31, 39), and the respondent County Treasurer threatened to cause a distress warrant to be issued to collect the taxes involved (Ex. 7, Tr. 304, 71).

Petitioner thereupon brought this suit for a declaration that Nebraska and Sarpy County were without power or authority to levy the taxes in question (Tr. 3). After trial the District Court ruled in petitioner's favor (Tr.

8. The form of tax schedule states, under part I, that "you will enter the value of all improvements owned by the business which are not assessed and taxed as real estate." (Tr. 299 (back)). This obviously means physical improvements.

9. See Neb. R. R. S. 1943, §§ 77-702; 1953 Cum. Supp. §§ 77-703.

10. The rate of tax was obviously higher than the rates permitted on intangible property, as described in the form. The tax levy on the property involved for the years 1952-1955 would have been approximately $100,000 if not enjoined.

42-49). See Appendix, *infra*, pp. 5-28. That Court held that the rental housing improvements were real estate and not personal property, and a part of the land on which Offutt Air Force Base is located, that the assessment of $755,785 against such improvements as personal property was illegal, and that the taxes assessed against the tangible property, whether real or personal, on Offutt Air Force Base, were beyond the authority of the State of Nebraska. In its opinion the trial Court held that "under the terms of the lease in question the actual legal title to the apartments, the dwelling units, the buildings themselves, is in the United States Government, exactly the same as it is on the land" (App., *infra*, p. 8), and that they were therefore "beyond the power of Sarpy County to tax as such" (App., *infra*, p. 10). The Court made no "commitment as to whether there might be some taxable leasehold interest" which would be "the very most that Congress has given any consent to tax, if they have given any consent at all" (App., *infra*, p. 10). But the Court concluded that "by no stretch of reasonable construction can the listing of improvements on leased property, or the listing of apartment houses, as was done" here, "be properly construed to be returning for taxation the value of a leasehold interest therein. It is attempting to tax the improvements themselves" (App., *infra*, p. 14). As to the appliances and office equipment, the Court held that under *Surplus Trading Co.* v. *Cook*, 281 U. S. 647, personal property on a military base over which the United States had exclusive jurisdiction could not be taxed, and that also they could not possibly be regarded as within any consent given by Congress to the taxation of leasehold interests (App., *infra*, pp. 13-14).

The Supreme Court of Nebraska reversed (Tr. 447-471, App., *infra*, pp. 29-53). It held that taxes were imposed only on Lessee's interest in the housing project, that Congress had re-ceded to Nebraska the right to tax Lessee's

interest in that project, that the Government's "bare legal title" to the buildings and improvements did not deprive petitioner "of the ownership of its interest as lessee, which for all intents and purposes was the actual value of all the buildings and improvements, together with the fixtures thereof and all personal property used therein" (App., *infra*, p. 46).

How the Federal Question Was Presented. As appears from the Statement, the Federal question as to whether the United States Constitution and statutes preclude Nebraska from taxing the property involved has been the principal issue in this case since its commencement. The question was presented in the amended complaint, particularly paragraphs IV, V, VIII, IX, X, XII, A, B, E and Prayer (Tr. 3-10), was decided by the District Court (Tr. 45 and oral opinion, App., *infra*, pp. 5-28), was argued in the briefs for both parties (Tr. 51, 53, 55), and was decided by the Nebraska Supreme Court (Tr. 451-471; App., *infra*, pp. 29-53).

REASONS FOR GRANTING THE WRIT.

I.

This case involves the right of the states to impose property taxes on military housing projects owned by the United States and constructed under the Wherry Act on land over which the United States has exclusive jurisdiction. We are advised by the Department of Defense that a leasing arrangement giving the United States title to improvements, such as is used in this case, has been employed on 203 of the 259 Wherry Act projects, in which 67,767 housing units have been constructed.[11] 159 projects

11. The total number of projects is 259, of which 72 are Army, 82 Navy, and 105 Air Force. Some early projects, principally of the Army, used leases giving the lessee title to the improvements. This form was abandoned and has not been used in recent years. It was involved in some of the litigation cited in notes 14 and 16, *infra*.

containing 53,339 units[12] are on land over which the United States has exclusive jurisdiction.[13]

Since the determination of this case rests upon the interpretation of the Federal constitutional immunity and of federal statutes, the importance of the questions presented far transcends Nebraska and the Offutt Air Force Base. Furthermore, Nebraska has upheld an assessment as tangible property of the buildings and improvements owned by the United States, not of petitioner's leasehold interest. Such a tax could presumably be imposed under the laws of all of the states as a tax on real property.

The question as to the taxability of similar projects is or has been before the courts in a number of states.[14] The

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12. The number as to the Navy was estimated.

13. Additional projects certified up to June 30, 1955, which may still be constructed under the Wherry Act, would also be affected. The original 1949 Act was extended to 1955. The Act of August 11, 1955, known as the Housing Amendments of 1955, Public Law 345, 84th Cong., revised Title VIII dealing with military housing, makes the Government the operator of projects built by private contractors under the 1955 Act, and also eliminates the provisions relied upon here as a waiver of immunity from state and local taxation. But Section 408 of the Act (quoted in Appendix, p. 75, *infra*) left the prior law applicable to projects certified prior to June 30, 1955. This means that the provisions of the original Wherry Act of 1949 involved in this case will still apply to the 203 projects referred to in the text.

14. *Meade Heights, Inc.* v. *State Tax Commission of Maryland*, 202 Md. 20, 95 A. 2d 280 (1953), relied on below, differed materially in that the older type of lease used in that case gave the lessee rather than the Government title to all buildings and improvements, with the right to remove them when the lease expired. See note 11 *supra*. The other cases primarily relied on by the court below involved sales or use taxes which Congress in the Buck Act (61 Stat. 641, 4 U. S. C. §§ 104-110) has specifically permitted to be imposed upon Federal areas. The cases are all therefore easily distinguishable, although the Florida cases (*Gay* v. *Jemison*, 52 So. 2d 137 (1951), and *Tampa Bay Garden Apartments* v. *Gay*, 55 So. 2d 739 (1951)) contain language which supports the decision below.

Court of Appeals for the Third Circuit has recently held such projects to be taxable, in a case arising in New Jersey, *Fort Dix Apartments Corp.* v. *Borough of Wrightstown*, No. 11512, decided August 23, 1955.[15] In Virginia, Massachusetts, New Mexico and Washington, state trial courts have held that the lessee of such projects may not be taxed on the value of the improvements.[16] We have also been advised by the Department of Defense that similar litigation is now pending in Texas, Mississippi, South Dakota, Missouri and Florida.[17] Attorneys General and other officials of 11 states—Connecticut, Colorado, Georgia,

15. We are advised that a petition for certiorari will be filed in the *Fort Dix* case.

16. *Thomason Park, Inc.* v. *County of Prince William*, Cir. Ct. of Prince William County, Virginia, decided January 5, 1955, appeal pending; *Westover Development Corp.* v. *Asselin*, Super. Ct. Hampden County, Mass., No. 74569, decided January 21, 1952; *Buena Vista Homes, Inc.* v. *Board of County Commissioners*, Dist. Ct., Dona Ana County, New Mexico, No. 13,213, 1954; *Moses Lake Homes, Inc.* v. *Grant County*, Super. Ct. for Grant County, Washington, No. 8095, opinions of October and December 1952 (not taxable after United States acquired title to buildings and improvements, taxable before). The well-reasoned opinion of the Virginia court in the *Thomason Park* case is printed in the Appendix, *infra*, pp. 54-68. An Alabama trial court has held the contrary in a case now pending before the State Supreme Court, *Brookley Manor, Inc.* v. *State of Alabama*, No. 547, First Div., Sup. Ct., Alabama. New York and Georgia trial courts have upheld the taxability of improvements where title to the improvements remained with the lessee rather than the United States, as was the situation in the *Meade Heights* case referred to in note 14, *supra*. *Fort Hamilton Manor* v. *Boyland*, pending on appeal, No. 12,252, New York App. Div., 2nd Dept.; *Conley Housing Corp.* v. *Coleman*, pending on appeal, No. 19001, Sup. Ct., Georgia.

17. *Likins-Foster Biggs Corp.* v. *Deason, Tax Assessor*, U. S. D. Ct., W. D. Tex., El Paso Div., Civil No. 1562; *Board of Supervisors of Harrison County* v. *Military Housing, Inc., Keesler AFB Project*, U. S. D. Ct., S. D. Miss., S. Div., Civil No. 1381; *Renel Heights, Inc.* v. *Gibbs, Treasurer*, 7th Jud. Cir. So. Dak., filed April 29, 1955; *State* v. *Personnel Housing, Inc.*, Cir. Ct., St. Louis County, Mo., No. 206031, Div'n. 6; *Patrick Gardens* v. *Nash, Tax Collector*, Cir. Ct., 9th Jud. Cir., Brevard County, Florida, No. 13,852.

Maine (Assistant Attorney General), Michigan, New Mexico, New York, Ohio, South Dakota, Wyoming (Assistant Attorney General), and the State Tax Commission of Oregon—have given opinions that such projects are not taxable.[18] In addition, the Attorneys General of Utah and Florida have held that the leasehold interest is taxable, but that the value of the buildings is not,[19] and the Attorneys General of Washington and Texas have ruled that leasehold interests are taxable except where the United States has exclusive jurisdiction.[20] (These opinions are

18. Connecticut, letter from Attorney General George C. Conway to Hon. William F. Connelly, Tax Commissioner, Hartford, Conn., October 15, 1952; Colorado, letter from Attorney General John W. Metzger to L. B. Arnold, Vice President, Industrial Federal Savings, Denver, Colorado, October 9, 1950; Georgia, letter from Attorney General Eugene Cook to Hon. J. Archie Johnson, Tax Collector, Chatham County, August 11, 1952; Maine, memorandum from Assistant Attorney General Boyd L. Bailey to State Tax Assessor, March 16, 1953; Michigan, letter from Attorney General Frank G. Millard to D. Hale Brake, Treasurer of Michigan, January 16, 1951; New Mexico, letter from Attorney General Joe Martinez to N. R. Reese, District Attorney, Roswell, New Mexico, December 10, 1951; New York, informal opinion letter from Attorney General Nathaniel L. Goldstein to Department of the Air Force, May 1, 1952; Ohio, letter from Attorney General William O'Neill to M. H. Heck, Prosecuting Attorney, Montgomery County, May 21, 1952; South Dakota, letter from Attorney General Ralph A. Dunham to Col. Hubert Miller, Rapid City Air Base, April 7, 1952; Wyoming, letter from Assistant Attorney General Jack D. Froggatt to Walter B. Phelan, County and Prosecuting Attorney, Cheyenne, Wyoming, May 15, 1951; Oregon, letter from State Tax Commission Attorney S. B. Stewart to District Public Works Office, 13th Naval District, U. S. Naval Receiving Station, Seattle, Washington, March 6, 1952.

19. Utah, opinion of Attorney General E. R. Callister to Davis County Attorney, April 30, 1955; Florida, letter from Attorney Richard W. Ervin, Office of the Attorney General, to Board of County Commissioners, Hillsborough County, July 25, 1950. The Utah opinion states that "The fair cash value of a leasehold is the present worth of the rental value of the property (income) for the unexpired term less the rent reserved and costs."

20. Washington, letter from Attorney General Smith Troy to Hugh H. Evans, Prosecuting Attorney, Spokane County, March 20, 1951; Texas, letter from Attorney General Price Daniel to Hon. Stewart W. Hellman, Criminal District Attorney, Tarrant County, August 22, 1951.

collected in the Office of the Chief, Management Branch, Family Housing Division, Directorate of Facilities Support, United States Department of the Air Force.) Thus, in 17 states, courts or officials have reached a conclusion contrary to that of the court below and of the 3rd Circuit.

The legislative history of the Wherry Act (*supra*, pp. 3-5) shows that its purpose was to provide low-rent housing for military personnel, not for their own sake, but in order to counter the great difficulty in keeping skilled trained men in the military services.[21] A high turnover decreases efficiency, and the training of new personnel is extremely costly to the Government, particularly as military activity becomes more technical and scientific. It was estimated that lower rentals and decent housing would cause 20% more of the Air Force to re-enlist (see note 1, pp. 3-4, *supra*). An important reason for using Government property for military housing has been to reduce the rentals which must be charged. Effectuation of this governmental purpose, which is directly related to the efficiency and the cost of maintaining the military services, will be impaired if the rentals must be increased to pay state and local taxes. For, as the record here demonstrates (Tr. 105, 201-202, 358), such taxes will be passed on to the military personnel occupying the apartments.

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21. See also the testimony of Col. Beck as to the importance of adequate housing to the retention of skilled Air Force personnel, as well as to morale and efficiency. (Tr. 105-106, 108-110.) General LeMay testified at the Hearings on the 1955 Housing Amendments (see note 13, p. 13, *supra*) (Hearings before a Subcommittee of the Senate Committee on Banking and Currency, 84th Cong., 1st Sess., on the Housing Act of 1955, p. 480):

> "In our surveys throughout Strategic Air Command we have determined that there are five factors which influence retainability of an individual in the Air Force. These are pay, commissary privileges, post-exchange privileges, medical care, and housing. Our surveys further have indicated that housing has a greater influence upon retainability than any of the other four."

The foregoing demonstrates that this case is sufficiently important for review by this Court because of its applicability to many large projects on military installations throughout the nation, because of the detrimental effect of the decision upon attainment of the purpose of the Federal statute, and because of the wide divergence of opinion in the states as to the proper solution of the question presented.

Before turning to the merits of the case, however, one significant preliminary observation should be made. This is not a case in which a state or locality which provides governmental services to an enterprise is being deprived of the revenues needed to pay for such services. Nebraska and Sarpy County do not provide such services on Offutt Air Force Base, and we are advised by the Department of the Air Force that this is generally true as to military bases over which the United States has exclusive jurisdiction. The housing project is not in a Nebraska school district (Tr. 142), which means that Nebraska does not use tax money to pay for schooling for military dependents.[22] As has been indicated, the Air Force provides access roads, fire and safety (police) protection, sewage and water service, which, with schools, are the principal items for which local governments collect taxes. Petitioner itself provides roads within the project (Tr. 237). (Under the Buck Act (note 14, p. 13, *supra*), residents

22. The Acts of September 23, 1950, 64 Stat. 967, and September 30, 1950, 64 Stat. 1100, as amended, 20 U. S. C. §§ 236-244, 251-280, provide for federal aid in the construction and operation of schools in areas affected by federal activities. We are advised that the Commissioner of Education has made arrangements under these statutes to pay for the education of children of Offutt Air Base personnel. See Annual Reports of the Commissioner of Education to Congress on the Administration of Public Laws 874 and 815, with respect to payments to the City of Bellevue, Nebraska, which adjoins Offutt Air Base: 1954 Report, pp. 65, 138; 1953 Report, pp. 59, 123; 1952 Report, pp. 52, 103; 1951 Report, pp. 28, 57.

within the military reservation must pay the state gasoline taxes which furnish revenues for the maintenance of state roads outside the base.) To require the military personnel to pay taxes for services which the State and local governments do not provide would be to create an inequity, not to abolish one.

II.

Both the buildings and improvements and the appliances and furniture sought to be taxed here were on a military base over which the United States has exclusive jurisdiction, which means that the United States has "complete sovereignty"[23] over that territory.[24] Absent the consent of Congress, the states cannot tax even the property of private persons on such federal enclaves. *Surplus Trading Co.* v. *Cook*, 281 U. S. 647 (blankets owned by a private company); *S. R. A., Inc.* v. *Minnesota*, 327 U. S. 558, 562-563; *Howard* v. *Commissioners*, 344 U. S. 624, 627. This principle applies to all the property in issue here, whether owned by the United States or by petitioner. In addition, the buildings and improvements are owned by the United States, and are not taxable by the State or county for that reason also; irrespective of their location.[25] *Van Brocklin* v. *Tennessee*, 117 U. S. 151; *United States* v. *Allegheny County*, 322 U. S. 174, 176-177.

The Supreme Court of Nebraska held that Congress has

23. *S. R. A., Inc.* v. *Minnesota*, 327 U. S. 558, 562.

24. The Air Force was careful to vest the United States with exclusive jurisdiction over newly acquired land on which part of the Offutt housing project was built (Ex. 2, Tr. 269).

25. The Act of Congress of April 19, 1864, providing for admission of Nebraska into the Union (13 Stat. 47), provides:

> "That the people inhabiting said territory do agree and declare that * * * no taxes shall be imposed by said state on lands or property therein belonging to or which may hereafter be purchased by the United States."

specifically re-ceded to the States the right to impose taxes such as that involved here. We shall show that Congress has not consented to the taxes in question.

1. *The 1949 Statute.* The Court below did not base its decision on Section 807, the only provision of the Wherry Act dealing specifically with the question of tax exemption. That section, which is common to many Titles of the National Housing Act,[26] provides that "Nothing in this Title shall be construed to exempt any real property acquired and held by the [Federal Housing] Commissioner" from local taxation. It was designed to make certain that government insured privately owned taxable property acquired by the Commissioner on default should not go off the local tax rolls, not that otherwise non-taxable governmental property be taxed. The provision has no application here, since no property held or acquired by the Commissioner is involved, and because on its face, Section 807 is not a waiver of a previously existing immunity but only a bar to an additional exemption for property otherwise taxable.

The only reference to the taxing problem, apart from a paraphrasing of Section 807 in the Committee Reports,[27] reflects an understanding that housing built on government land would not be taxable. During the Hearings before the House Committee, after Housing and Home Finance Administrator Foley had stated that he did not know what proportion of the projects would be built on Government-owned property, the following colloquy oc-

26. § 57, 55 Stat. 365, 12 U. S. C. § 1706b; § 208, 48 Stat. 1252, 12 U. S. C. 1714; § 307, 48 Stat. 1255, 12 U. S. C. § 1722; § 606, 55 Stat. 61, 12 U. S. C. 1741.

27. S. Rept. 410, 81st Cong., 1st. Sess., p. 8; H. Rept. No. 854, 81st Cong., 1st Sess., p. 7, each of which states that "Section 807 would provide that the acquisition of real property by the Commissioner under Title VIII would not exempt it from taxation."

curred (Hearings on Military Rental Housing before House Committee on Banking and Currency, H. R. 4491, 81st Cong., 1st Sess., p. 37):

> "Rep. Nicholson. If they were built on land other than the reservation, the housing would be taxed, would it not?
>
> "Mr. Foley. You mean building on lands adjacent to military installations but not owned by the military?
>
> "Rep. Nicholson. That is right. That would be subject to tax by the local community * * *."

Neither the Administrator nor anyone else at that time or later suggested that Rep. Nicholson's statement, which implied that only housing built off the reservations could be taxed, was too restrictive.

The court below rested its decision on Section 805 of the Wherry Act (63 Stat. 570, 12 U. S. C. § 1748(d)), which provides:

> "Whenever the Secretary of the Army, Navy, or Air Force determines that it is desirable to lease real property within the meaning of the Act of August 5, 1947 (61 Stat. 774), to effectuate the purposes of this title, the Secretary concerned is authorized to lease such property under the authority of said Act upon such terms and conditions as in his opinion will best serve the national interest without regard to the limitations imposed by said Act in respect to the term or duration of the lease, and the power vested in the Secretary of the Department concerned to revoke any lease made pursuant to said Act in the event of a national emergency declared by the President shall not apply."

On its face this Section says nothing about waiving immunity from taxation. But the authority to lease "under the authority of" the Act of August 5, 1947 is said to incorporate by reference the provision in Section 6 of the latter statute, quoted at p. 5, *supra*, which provides that

"the lessee's interest, made or created pursuant to the provisions of this Act, shall be made subject to State or local taxation."

2. *The 1947 Statute.* (a) If it be assumed *arguendo* that this provision is incorporated by reference in the 1949 Act and that it applies to Federal enclaves (but see pp. 26-28, *infra*), the tax involved here was nevertheless not authorized. For the tax here was not imposed upon the "lessee's interest," but upon the tangible property, most of which was owned by the United States. Section 6 differentiates between the two, since under the second sentence "such property" may be taxed only if made taxable by subsequent act of Congress. Here, as appears from Ex. 5, Tr. 298-299, App. *infra*, pp. 3-4, the assessment which was sustained was on office furniture, "Household Appliances" and "Improvements on Leased Land", as "TANGIBLE PROPERTY."[28] The value of that physical property was assessed (Tr. 258-259), not anything else. That is what the Assessor said he was assessing. The "lessee's interest" would not be tangible property, and if taxed as an intangible (which it was not) would have been taxed at a much lower rate. See p. 10, *supra*.

The tangible "Improvements on Leased Land" (the apartment buildings) were not taxable under a statute permitting taxation of the "lessee's interest". The improvements were real estate owned by the United States, which retained title under Section 11 of the lease.

The court below advanced several reasons why it thought the tax imposed merely on the lessee's interest. In the first place, it misconstrued, and refused to give effect to, the provisions of the lease that "all improvements shall

28. It does not seem material that the property was assessed as tangible personalty rather than realty, though the buildings and improvements actually were, and were stated in this lease (p. 7, *supra*) to be, "real estate".

remain the property of the Government", and that "the buildings and improvements erected by the lessee * * * shall be and become as completed, real estate and part of the leased land, and public buildings of the United States * * *." See p. 7, *supra*. It held that this language "simply provided when and in what manner plaintiff's interest would ultimately become the Government's property," and "simply prevented plaintiff from destroying the mortgage security insured by the Government * * * by removing any of the buildings or improvements * * * and assured plaintiff's performance of the terms and conditions of the mortgage and lease." Appendix, *infra*, pp. 45-46. The Court concluded that the Government had the "bare legal title" (Appendix, *infra*, p. 46) and that "plaintiff was in fact and as a matter of law the owner of all the improvements * * *." Appendix, *infra*, p. 47.

As to the buildings and improvements, the court's ruling was contrary to the unambiguous provisions of the lease. This Court, not the state court, has the final say "in determining the meaning and effect of contracts to which the United States is a party." *S.R.A., Inc.* v. *Minnesota*, 327 U. S. 558, 564;[29] *United States* v. *Allegheny County*, 322 U. S. 174, 183; *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110, 121, and cases cited. Here the contract of lease plainly placed title to the buildings and improvements in the United States. The fact that a purpose of the Government in putting this provision in its form lease may have been to prevent taxability by local bodies would not make it any the less effective.[30] *Kern-Limerick, Inc.* v.

29. The Government's interest was not a mere security interest such as that in the *S. R. A.* case.

30. The statement below (Tr. 467, App. *infra*, p. 47) that "To conclude [that plaintiff was not the owner of the improvements] would permit plaintiff to perpetrate a sham and fraud between the state and its governmental subdivisions." disregards the fact that the provisions of the lease were a part of the government form, and not drafted or suggested by plaintiff.

Scurlock, 347 U. S. 110, 116, 122. Nor does the fact, relied upon below, that the buildings had a shorter economic life expectancy than the lease, mean that the Government lacked title to them, or that its interest was merely nominal.

Moreover, if we go behind the formal documents, it is clear that the Government had a substantial interest in the project. It took most of the financial risk by insuring the mortgage. It determined who could occupy the apartments. It prescribed the maximum rentals. It owned the controlling voting interest in the petitioner. It provided most of the necessary governmental services (see pp. 8, 17, *supra*). Thus a large part, and indeed the most important parts, of the bundle of rights which is normally vested in the owner of a building remained with the Government. The petitioner-lessee is in substance little more than the manager of the project, with the right to whatever profits the Government deems reasonable. And the reason for the Government's interest, as has been shown, is the importance of adequate low-rental housing for the effective maintenance of the Armed Forces.

The Court below also seems to have held that the petitioner's interest as lessee "for all intents and purposes was the actual value of all the buildings and improvements, together with the fixtures thereof and all personal property used therein on the leased land so long as its lease was in force and effect" (App., *infra*, p. 46). But the issue is not as to the value of the lessee's interest,[31] but whether the tax was imposed upon that interest or upon the tangible property itself, which was owned by the United States and not taxable. As to that, this Court is not bound by the state court's characterization of the tax.

"'Where a federal right is concerned we are not

31. Clearly the appliances were lessee's own property, and taxable as such or not at all.

bound by the characterization given to a state tax by state courts or legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted.' *Carpenter* v. *Shaw*, 280 U. S. 363, 367-68." *United States* v. *Allegheny County*, 322 U. S. 174, 184.

The decision below in this respect is inconsistent with this Court's decision in the *Allegheny County* case. In that case, the Pennsylvania court had declared the state tax not to be on the Government-owned machinery, leased to the Mesta Corporation, but that the machinery was considered only as an enhancement of the value of Mesta's land. This Court held, however, that assessment of the machinery, under the general *ad valorem* property tax, proved that "the machinery itself was being assessed and taxed." *Id.*, at 185. Similarly here, the record demonstrates, as the trial court held (App., *infra*, p. 14),[32] that the assessment was imposed directly upon the Government-owned buildings and the appliances, and not upon an intangible leasehold interest (which, under Nebraska law, could only be taxed at substantially lower rates). As in the *Allegheny County* case, "The assessor simply forthrightly valued * * * the Government's machines as

32. The trial court's oral opinion stated (App., *infra*, p. 14) "* * * certainly by no stretch of reasonable construction can the listing of improvements on leased property, or the listing of apartment houses, as was done on the 1952 personal property tax schedule return by the assessor for the plaintiff in this case, be properly construed to be returning for taxation the value of a leasehold interest therein. It is attempting to tax the improvements themselves, which I say you can not do because they belong to the United States Government and that has removed them beyond the field of Sarpy County to tax without consent, and I am not making any commitment as to whether or not Sarpy County could tax the value of a leasehold interest in something to which possibly Congress has consented; I do not know what the value of such leasehold interest would be, but that is something that does not have to be passed upon at this time in order to decide the issues in the case presented * * *."

machinery." Here the assessor valued the Government's buildings and improvements as "improvements". The Court said in that case (p. 185):

> "We discern little theoretical difference, and no practical difference at all, between what was done and what would be done if the machinery were taxed in form. Its full value was ascertained and added to the base to which the annual rates would apply * * *."

The same is true of the Government-owned buildings here, except that the assessment schedule shows that they were taxed in form as well as in substance. The lessee's interest may or may not be as valuable as the tangible properties[33]—but the Nebraska assessor did not purport to tax it, and the Nebraska court cannot transform a tax on the Government properties into a tax on the lessee's interest.

The appliances and furniture, assessed at $69,900 out of the total assessment of $825,685, are also not assessable as a "lessee's interest, made or created pursuant to the provisions of this Act". They were never leased by the Government to petitioner, but were bought by petitioner in its own name and hence would not be covered by a statutory provision waiving immunity for leased Government property. See App., *infra*, p. 12. Whatever interest the petitioner had in them was not made or created under the Act or by a lease, but by its purchase, which gave it complete title. The status of this property, therefore, was the same as that of any personal property on an exclusive federal enclave, unaffected by Section 6.

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33. The value of the "lessee's interest" would be that of the property minus the cost paid for it, not the value of the property. *Blinn Lumber Co.* v. *Los Angeles County*, 216 Cal. 468, 474, 14 P. 2d 516, 512 (1932); *Yeoman Mut. Life Ins. Co.* v. *State Board*, 229 Iowa 320, 294 N. W. 336 (1940); *People* v. *Sexton*, 258 N. Y. App. Div. 611, 17 N. Y. Supp. 2nd 585 (1940). Although the opinion below contains a passage (Tr. 456, App., *infra*, p. 36) implying that the petitioner has received substantial profits, the record shows that the operation has not been profitable (Tr. 236).

(b) In the preceding discussion it has been assumed that Section 6 of the 1947 statute is applicable. However, the phrase in the Wherry Act of 1949 which refers to the earlier statute does not clearly incorporate by reference anything but the authorizing provision in Section 1 of the latter Act (61 Stat. 774, 5 U. S. C. § 626s-3). As has been shown (pp. 19-20, *supra*), there was no recognition or suggestion in the history of the 1949 Act that any waiver of immunity beyond that provided in Section 807 was contemplated by anyone. The 1947 Act, as has been shown, was concerned with federally owned industrial facilities. The considerations which caused Congress to permit taxing the lessee's interest in such properties did not apply to the 1949 Military Housing Act. If the military housing was not constructed on Federal land, it would be taxable by the states without congressional consent. If the housing project was on a Federal enclave, and not furnished services by the states but by the United States itself, there was no reason why even the lessee's interest in the property should be subject to local taxes. The competitive and other factors which were responsible for a partial waiver of immunity for the industrial plants are lacking here.

Furthermore, we submit, the waiver of immunity for the "lessee's interest" was not intended to apply to enclaves over which the United States has exclusive jurisdiction.

The provision in question was suggested in discussions during the course of the 1947 Senate Committee Hearing between Senator Tydings, Under Secretary Royall and Assistant Secretary Kenney.[34] Senator Tydings and Secretary

34. Hearing before the Senate Committee on Armed Services on S. 1198 (H. R. 3471), 80th Cong., 1st Sess., a Bill to Authorize Leases of Real or Personal Property by the War and Navy Departments, pp. 30-32.

"Senator Tydings. No. First of all, you would have to set up on the assessment books what the company actually owned. What he would own would be a lease. He would

Kenney urged that any such provision was unnecessary, since the states had the power to tax leasehold interests without it. But Secretary Royall, who proposed the language in question, thought it better to eliminate any doubt as to the matter. As a result, the language found in the

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not own the property. Your law would not say that notwithstanding that he does not own any more than the lease, he shall be taxed on the property. He would go to the assessor and prove he only had a leasehold in it for 1 or 10 years. He could not be assessed more than his lease is worth. He could not be assessed for the physical value of the property because he does not own it. He could be assessed for what his lease is worth. That would be all." (P. 30.)

"Mr. Royall. As I say, I understand the possessory interest tax has been applied, and I think it is constitutional. That would apply to this situation if it is constitutional, and I imagine it is.

"You could say in this statute, if there is any question about that, that the possessory interests of the lessee should be subject to local tax.

"Mr. Kenney. A local taxing authority can make the leasehold subject to tax if they want to. That is a matter for the local legislatures to take care of.

"Senator Tydings. You cannot make a man pay taxes on what he does not own.

"Mr. Kenney. Your State could make the leasehold interest itself taxable, which I think should be all that could be taxable.

"Senator Tydings. That is right. Say the lease was for 5 years. You could take up the value of the lease, which would be an infinitesimal part of the value of the property." (P. 31.)

"Senator Tydings. As a matter of fact, if the Government leases to corporation AB a plant for a period of 5 years without us doing anything about it, they would be taxable by each community in America that taxes leasehold property. So why should we put anything in?

"Mr. Kenney. I do not think that you should put anything in this bill.

"Senator Tydings. That is what I am getting at.

"Mr. Royall. I do not see any objection to putting it in there if there is any question about it. You had some language here that the possessor of the leasehold interest pursuant to this act may be subject to local or State taxation. That would help.

"Senator Tydings. Upon the lessee?

"Mr. Royall. That is right." (Pp. 31-32.)

law was agreed upon. This discussion makes sense only if Secretaries Royall and Kenney and Senator Tydings were speaking of Government-owned property leased to private persons in territory subject to state jurisdiction, not property in a Federal enclave. For if it were in territory subject to exclusive Federal jurisdiction, the lessee's interest would not have been taxable without the express consent of Congress, as those good lawyers must have known.

With respect to federal enclaves, a partial recession of jurisdiction, not a mere waiver of immunity, is required to permit state taxation. When Congress wishes to restore such jurisdiction to the states, it does so in clear and express terms. Thus, in the Buck Act of July 30, 1947, 61 Stat. 641, 4 U. S. C. §§ 104-110, enacted six days before the 1947 Leasing Act here involved, Congress authorized the states to impose sales, use and income taxes in "Federal areas", and to impose gasoline taxes on "United States military or other reservations". *Cf. Howard* v. *Commissioners*, 344 U. S. 624, 627-8. See also Assimilated Crimes Act, 62 Stat. 683, 18 U. S. C. §§ 13, 7; Wrongful Death Act, 45 Stat. 54, 16 U. S. C. § 457 ("within a national park or other place subject to the exclusive jurisdiction of the United States"); Workmen's Compensation Act, 49 Stat. 1938, 40 U. S. C. § 290 (lands "owned or held by the United States of America by deed or act of cession").

The bare reference to "lessee's interest", in the 1947 Leasing Act, certainly is not clear and specific enough to manifest an intention to recede *pro tanto* federal jurisdiction over the military enclaves.

CONCLUSION.

This case involves important questions with respect to the power of the states to impose taxes on federally-owned properties in Federal enclaves. The decision below will hamper the Federal program of aiding the military forces through providing low-rental housing for military personnel, and is in conflict with the reasoning of this Court in the *Allegheny County* case. The problem is arising with respect to many Federal military installations. For these reasons, this petition for certiorari should be granted.

Respectfully submitted,

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